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In The

Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

ELMER H. THOMASSEN,
JOAN THOMASSEN,
WILLIAM THOMASSEN,
ROSE HORN, and
GEORGE THOMASSEN,
Petitioners

v.

UNITED STATES OF AMERICA, and
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT ABUSED ITS DISCRETION IN DISMISSING THE APPEALS BELOW AND THEN IN NOT RECALLING THE MANDATES AND NOT REINSTATING THE APPEALS BELOW UPON THE MOTION OF APPELLANTS BELOW.

II. WHETHER A U.S. COURT OF APPEALS SHOULD REINSTATE AN APPEAL WHEN IT DISCOVERS THAT EX PARTE PREJUDICIAL COMMUNICATIONS FROM THE DISTRICT COURT INFLUENCED THE DISMISSAL OF THE APPEALS.

III. WHETHER A U.S. COURT OF APPEALS SHOULD RECALL ITS MANDATE TO PROTECT ITS OWN INTEGRITY WHEN IT HAS BEEN ADVISED THAT FAILURE TO PERFECT THE APPEALS HAS BEEN CAUSED IN PART BY THE ERRORS OF THE DISTRICT COURT AND COURT REPORTERS IN PROCESSING THE APPEALS AND NOT BY THE NEGLIGENCE OF THE APPELLANTS.

IV. WHETHER THE DISMISSAL OF APPEALS AND FAILURE TO RECALL THE MANDATES VIOLATES PETITIONERS' RIGHT TO DUE PROCESS WHEN FAILURE TO TIMELY PERFECT THE APPEALS WAS DUE TO ERRORS MADE BY THE DISTRICT COURT AND COURT REPORTERS IN PROCESSING THE APPEALS AND DUE TO UNAVOIDABLE ERRORS OF THE PRO PER APPELLANTS.

V. WHETHER THE DISMISSAL OF APPEALS AND FAILURE TO RECALL THE MANDATES VIOLATE PETITIONERS' RIGHT TO REPRESENT THEMSELVES AS GUARANTEED BY THIS COURT'S DECISION IN OSBORN V. PRESIDENT 22 US 738. WHEN THE DECISION TO DISMISS THE APPEALS AND NOT REINSTATE THEM WAS INFLUENCED BY COMMUNICATIONS FROM THE DISTRICT COURT JUDGE AND REPORTER WHO WERE PREJUDICED AGAINST PRO SE LITIGANTS.

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PETITION FOR WRIT OF CERTIORARI

The petitioners ELMER H. THOMASSEN, JOAN THOMASSEN, WILLIAM THOMASSEN, ROSE HORN and GEORGE THOMASSEN, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, rendered April 30, 1981 and May 4, 1982 dismissing the appeals below and the order of June 15, 1982 denying the motion to recall the mandates and the order of August 20, 1982 denying the petition for rehearing and rejecting the suggestion for rehearing en banc. The judgment and orders are set forth in the appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

OPINIONS BELOW

Ninth Circuit. There was no formal opinion rendered by the U.S. Court of Appeals for the Ninth Circuit. The orders entered are as follows: Order dismissing appeal No. 79-3562, entered April 30, 1981 (Appendix at A-9);

Order consolidating appeal Nos. 79-3596 and 79-3783 and denying motion to proceed on appeal in forma pauperis, entered August 25, 1981 (Appendix A-7);Order dismissing appeal Nos. 79-3596 and 79-3783, entered May 4, 1982 (Appendix A- 5); Order denying motion to recall mandates, entered June 15, 1982 (Appendix A-4); Order denying rehearing and rejecting suggestion for rehearing en banc, entered August 20, 1982 (Appendix A-2).

District Court. There was no formal opinion rendered in the district court below; however, the detailed Amended Judgment entered on July 12, 1982 is set forth in the Appendix at A-12 and Findings of Fact and Conclusions of Law at A-31.

JURISDICTION

The order dismissing two appeals below was entered May 4, 1982 (79-3596 and 79-3783) and a third appeal was dismissed on April 30, 1981. Within 14 days of the order dismissing the appeals, a motion to recall

the mandates was filed on May 17, 1982. The Ninth Circuit denied the motion to recall the mandates on June 15, 1982. A timely petition for rehearing with a suggestion for rehearing en banc was filed. The petition for rehearing was denied on August 20, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

PRIMARY CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED.

Constititution of the United States, Amendment V:

> No person . . . nor shall be deprived of life, liberty or property, without due process of law;

Title 28, United States Code, Section 452

> The continued existence or expiration of a session of court in no way affects the power of the court to do any act or to take any proceeding.

Rule 41 (a) of the Federal Rules of Appellate Procedure.

> (a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

Rule 19 (b) of the Local Rules for the U.S. Court of Appeals for the Ninth Circuit

> (b) Dismissal for Failure to Prosecute. When an appellant fails to timely file the record, pay the docket fee, file a brief or otherwise comply with rules requiring processing the appeal to hearing, the clerk will enter an order dismissing the appeal. The clerk will notify each appellant in writing of this provision of the rules.

STATEMENT OF THE CASE

This is an action brought by the United States in the United States District Court for the Central

District of California to set aside as fraudulant certain conveyances of real property from petitioners to third parties and to determine the validity and priority of liens against said real property. An Amended Judgment (Appendix at A-12) was entered on July 12, 1979, setting aside the conveyances as fraudulant and determining that the liens against the property were valid, which liens had priority over others, and ordering the sale of the real property to satisfy the liens. One of the properties is the residence of Elmer H. Thomassen and Joan Thomassen, petitioners herein.

Post trial motions for new trial and setting aside judgment, and for a stay without bond were denied.

Petitioners appealed to the United States Court of appeals for the Ninth Circuit timely. The first appeal, U.S. v. Elmer Thomassen, et al. (No. 79-3562) was brought by petitioner George Thomassen to appeal the judgment of July 12, 1979. The second appeal (No. 79-3596) was brought by petitioners Elmer H.

Thomassen, Joan Thomassen, William Thomassen and Rose Horn to appeal the judgment of July 12, 1979. The third appeal (No. 79-3783) was brought by all the petitioners above and appeals the denial of the post trial motions for new trial, stay pending appeal, approval of nominal supersedeas bond and for vacation or modification of the judgments.

A temporary stay of the appeal was granted pending determination of whether section 362 (a) of the Bankruptcy Code applied to the appeal (automatic stay provision). When the Ninth Circuit determined that the automatic stay provision of the Bankruptcy Code did not apply to the the appeals below, petitioners Elmer H. Thomassen and Joan Thomassen moved to appeal in forma pauperis because the judgment below had rendered them insolvent. This motion was denied (Appendix at A-11).

Subsequent to the denial of the motion, August 25, 1981, petitioners ordered the transcripts to be

transcribed and filed so that the certificate of record could be forwarded to the Ninth Circuit. The U.S. District Court lost or misplaced the trial transcripts, thus requiring the court reporter to file the transcripts several times and finally he was required to re transcribe the entire transcript for one of the trial days because the court lost or misplaced the transcripts again.

The Ninth Circuit dismissed the appeal of George Thomassen (No. 3562) on April 30, 1981 for failure to perfect the appeal and then dismissed the appeals Nos. 79-3596 and 79-3783 on May 4, 1982 for failure to perfect the appeals.

Petitioners filed a motion to recall the mandates and brought to the attention of the Ninth Circuit that the failure to perfect the appeals was not the fault of petitioners. The Ninth Circuit denied the motion on June 15, 1982. The appeals were perfected on June 25, 1982 and petitioners moved for a rehearing with a

suggestion for rehearing en banc. In support of the motion was a letter from the court reporter John Murdock (Appendix at A-67) stating that the failure to perfect the appeals was not due to the negligence of the appellants but due to the loss or misplacing of the transcripts by the district court and because of an understandable misunderstanding between another court reporter and the petitioners. On August 20, 1982 the U.S. Court of Appeals for the Ninth Circuit denied the motion for rehearing and suggestion for rehearing en banc. (Appendix at A-2).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS RENDERED A DECISION WHICH HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN NOT RECALLING THE MANDATE, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The United States Court of Appeals for the Ninth Circuit should have exercised its power to recall the mandates in the appeals below and reinstate the petitioners appeals.

The U.S. Court of Appeals for the Ninth Circuit has the inherent power to recall the mandates issued in the case below which mandates dissmissed the appeals below. The inherent power is derived from Rule 41 of the Federal Rules of Appellate Procedure, although the power is not specifically provided for in the appellate rules. Briggs v. Pennsylvania R. Co., 334 U.S. 304, 306 (1948); Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 U.S. 238, 244-245 (1944); Sparks v. Duval County Ranch Co., Inc. 604 F2d 976 (5th Cir. 1979). It further has the power to recall and amend its mandate to protect the integrity of its own processes. Briggs v. Pennsylvania, supra at 306; Perkins v. Standard Oil Co. of California, 487 F.2d 672 (9th Cir. 1973); Samson Tire & Rubber Corporation v. Rogan, 140 F.2d 457 (9th Cir. 1943); Huntley v. Southern Oregon Sales, 104 F.2d 153, 155 (9th Cir. 1939); accord, Petersen v. Klos, 433 F.2d

911, 912 (5th Cir. 1970).

Court of appeals' mandates may be recalled to avoid injustice, Alphin v. Henson 552 F.2d 1033 (4th Cir. 1977), certiorari denied 434 U.S. 823; Gradsky v. U.S. 376 F.2d 993 (5th Cir. 1967) certiorari denied 389 U.S. 908; Sun Oil Co. v. Burford 130 F.2d 10 (5th Cir. 1942) revd . on other grounds 319 U.S. 315, rehearing denied 320 U.S. 214.

Even prior to the enactment of section 452 of the Judicial Code in 1948, judgments were set aside after the term in which the judgment was rendered had expired when the enforcement of a judgment was considered unconscionable or where the judgment had been obtained fraudulently. Hazel-Atlas Glass Co. v. Hartford-Empire Co. , supra at 244-245; Pickford v. Talbott 225 U.S. 651. With the enactment of section 452 of the Judicial Code in 1948 the distinction between recalling the mandate during the same term that the judgment was rendered and later relief was abolished:

> The continued existence or expiration of a session of court in no way affects the power of the court to do any act or to take any proceeding. 28 U.S.C. 452.

The circumstances which caused the failure of petitioners to perfect the appeals below were unusual and unavoidable and not due to the negligence of the petitioners, but due to the errors of the court and court reporters, and therefore the United States Court of Appeals for the Ninth Circuit should have exercised its power to recall the mandates in the instant appeals and reinstate the appeals, and this Court should exercise its supervisory powers to order the recall of the mandates in the instant appeals and reinstate the appeals to avoid injustice and protect the integrity of the courts.

Because the decision in the District Court below in 1979 (Appendix A-12) rendered the petitioners insolvent, the petitioners filed for relief in the United States Bankruptcy Court for the Central District of California in January 1980. In the early months of the appeals below (Nos. 79-3562, 79-3596, 79-37883) in the

Ninth Circuit, the appeals were stayed by the U.S. Court of Appeals for the Ninth Circuit to determine whether the automatic stay provision of the recently enacted 11 U.S.C. 362 (a) of the Bankruptcy Code applied to the instant appeals. After a determination that the automatic stay did not apply to the appeals herein, the stay was removed and the petitioners Elmer H. Thomassen and Joan Thomassen moved to appeal in forma pauperis because of their insolvency. The U.S. District Court for the Central District of California denied petitioners' request to appeal in forma pauperis. (Appendix at A-11).

Through no fault of the petitioners, but due to the errors of the court and the court reporter, the trial transcripts could not be found by the District Court or the court reporter. This required the court reporter, John Murdock, to refile several copies of the transcripts and re-transcribe the transcripts. On April 30, 1981 appeal No. 79-3562 was dismissed for failure to perfect the appeal (Appendix A-9). On May 4, 1982, the U.S.

Court of Appeals for the Ninth Circuit entered an order dismissing the appeals Nos. 79-3596 and 79-3783 for failure to perfect the appeals pursuant to Local Rule 19 (b). (Appendix A- 5).

Petitioners filed a Motion to Recall the Mandates. The motion was denied on June 15, 1982 (App. at A-4). Petitioners then filed a Motion for Rehearing with a Suggestion for Rehearing en Banc. In support of that motion for rehearing, court reporter John Murdock wrote a letter to the U.S. Court of Appeals for the Ninth Circuit on June 25, 1982 explaining the unavoidable problems which prevented the perfection of the appeals, and a copy of said letter was attached to the Appellants' Joint Motion for rehearing with a Suggestion for Rehearing en banc of Appellants' Motion to Recall the Mandates, as Exhibit A (App. at A-67). Said Motion for Rehearing was also denied on August 20, 1982. (Appendix at A-2).

In Mr. Murdock's letter dated June 25, 1982

(Appendix at A67) to the U.S. Court of Appeals for the Ninth Circuit, Mr. Murdock explained that the appeals had not been perfected because the transcripts had notbeen completed and the certificate of record was to be forwarded by the Clerk of the U.S. District Court for the Central District of California either on June 25, 1982 or the following Monday. (Certificate of Record, Appendix at A-72). It was further explained by Mr. Murdock in his letter that the errors were unfortunate but understandable and apparently not the fault of the appellants/petitioners.

In the instant case the appeals below had not been timely perfected because of mistake, inadvertance, and unavoidable errors on the part of the district court in losing the transcripts on the part of the appellants. The Ninth Circuit should have set aside the mandates to protect its own integrity and to prevent injustice, and not to do so was an abuse of discretion. All of the transcripts in the appeals are now complete and ready to be forwarded to the Ninth Circuit by the district

court. The Certificate of Record has been filed since June 25, 1982. The appeals are now perfected and ready to be briefed when this Court reinstates the appeals.

Wherefore, petitioners request that this Court exercise its supervisory power to order the recall of the mandates of the Court of Appeals below and order the reinstatement of the appeals below. Petitioners have no other adequate remedy at law or equity. Suing the Court or court reporters would not reinstate the appeals nor adequately compensate for the value of the property involved in these appeals.

B. It is within the supervisory powers of the Supreme Court to correct the grave injustice done to petitioners and failure to do so would result in a denial of due process which is guaranteed by the due process clause of the Fifth Amendment and a violation of petitioners' right to represent themselves without an attorney per the holding of this Court in Osborn v. President, 22 U.S. 738.

Petitioners request that this Court exercise its power to supervise the U.S. Court of Appeals for the Ninth Circuit because of the grave injustice that will be done to the petitioners if they are not permitted the opportunity to appeal the U.S. District Court decision below (Appendix at A-12). Petitioners will further be denied their day in court as guaranteed by the due process clause of the Fifth Amendment if their appeals are not reinstated.

The U.S. District Court below set aside conveyances of real property which were conveyed from petitioners Elmer H. Thomassen and Joan Thomassen in 1972 to William Thomassen, Rose Horn and George Thomassen. The District Court below further ordered that liens of various creditors were valid liens against said property and declared the priority of the liens and ordered the real property sold to satisfy said liens. (Amended Judgment, Appendix at A-12).

The real estate which is the subject matter o the appeals below is valued in excess of $500,000.00 and includes the residence of petitioners Elmer H. Thomassen and Joan Thomassen.

Throughout the proceedings below in the U.S. District Court for the Central District of California in Los Angeles, Judge Manuel Real, presiding, the pro per defendants Elmer H. Thomassen, Joan Thomassen, Rose Horn, and William Thomassen maintained that they had not been properly served and moved to dismiss the action because of improper service on them and moved to quash summonses allegedly served on them. Defaults were entered against Elmer H. Thomassen, Joan Thomassen, William Thomassen and Rose Horn for their failure to answer the complaint and motions to set aside defaults were denied.

In spite of entering defaults against Elmer H. Thomassen, Joan Thomassen, William Thomassen and Rose Horn, presiding Judge Manuel Real did permit the

defendants to participate in the trial on March 13, 1979 and March 14, 1979 and permitted Elmer H. Thomassen and Joan Thomassen to argue pre-trial and post-trial motions; thus, in effect, nullifying his entry of defaults against Elmer H. Thomassen and Joan Thomassen.

Throughout the proceedings in district court Judge Manuel Real evidenced prejudice against pro per litigants Elmer H. Thomassen and Joan Thomassen and refused to relax the Local Rules and Federal Rules of Civil Procedure and refused to relax the Rules regarding form of pleadings, timeliness, shortening time for filing motions and other formalities of the proceedings, as it pertained to the pro per litigants; however, on the other hand, the Court repeatedly relaxed the Rules for the other parties who were represented by counsel.

Pro per litigants Elmer H. Thomassen and Joan Thomassen moved on March 13, 1979 to have Judge Real disqualify himself because he was prejudiced

against pro per litigants and against Elmer H. Thomassen and Joan Thomassen in particular. Judge Real refused to disqualify himself.

When petitioners Elmer H. Thomassen and Joan Thomassen moved for an order regarding appeal in forma pauperis before District Judge Manuel Real on December 10, 1979, Judge Real again showed his prejudice against the petitioners Elmer H. Thomassen and Joan Thomassen by his remarks at the end of the motion when he denied petitioners' motion. Denial entered December 18, 1979. (Appendix at A-11)

Motion denied. This appeal is frivolous and interposed only for the purpose of delay. Defendant Elmer and Joan Thomassen were in default in the matter and were allowed appearance only as a matter of grace.

Judge Real again showed his prejudice against the pro per litigants when his personal court reporter

Florence Carcia made ex parte remarks to the Ninth Circuit, in her communication dated April 16, 1982 to the Ninth Circuit, in a Motion for Extension of Time to file Transcript: (Appendix at A-74)

> This man is just trying to avoid the inevitable and his appeal should be dismissed. If it has been dismissed, thanks for notifying the reporter.

The above remarks were improper and unprofessional ex parte communications and improperly influenced the Ninth Circuit to dismiss the appeals below. Petitioners/ appellants did not discover this ex parte communication until after the appeals had been dismissed. The U.S. District Court judge below and his court reporter improperly influenced the Ninth Circuit to dismiss the petitioners' appeals because of their prejudice against pro se litigants. This is in violation of petitioners' rights since they have the right to represent themselves in court, as this Court held in Osborn v. President, Directors & Co. of Bank, 22 U.S. 738.

The appeals which the petitioners request to have reinstated are not frivolous. The petitioners enumerated nine issues in their "Statement of Issues on Joint Appeal" filed October 4, 1979 which are all valid issues for appeal and are not frivolous. The issues enumerated by attorney John Joseph Matonis were as follows:

1. The statute of limitations has run against the plaintiff and or crossclaimants because the state statute applies.

2. No bond is needed to stay collection of Tax Court assessment, because Appellant Elmer Thomassen and Appellant Joan Thomassen were in forma pauperis, or, in the alternative, Title 26, United States Code, Section 7485, violates the due process clause of the Fifth Amendment.

3. A jury trial was demanded timely, but this demand was refused by the Court.

4. Appellant Joan Thomassen was represented in Tax Court, and in this Court by her husband, who was not a licensed attorney and, therefore, the Tax Court judgment is void and cannot be collected.

5. Judge Manuel Real was grossly unfair to the defendants and was biased and prejudiced against these defendants in favor of the United States of America and the Franchised Tax Board of the State of California, a cross-claimant, as well as some of the other defendants.

6. Defendants and Appellants Elmer Thomassen, Joan Thomassen, William Thomassen, and Rose Horn were never legally served with process; and/or were defaulted without due process.

7. Judge Real signed the Amended Judgment on June 8, 1979, while the Defendants Elmer and Joan Thomassen, William Thomassen, George Thomassen, and Rose Horn still had an opportunity to respond timely.

8. Appellants Joan and Elmer Thomassen should have the opportunity to reopen the Tax Court proceedings to substantiate deductions in order to prevent a miscarriage of justice; i.e., the collection of an amount of a tax far in excess of any real liability, which assessment resulted from Elmer Thomassen's excusable neglect and misunderstanding of the Fifth Amendment privilege not to be a witness against himself, as well as Joan Thomassen's being represented by Elmer Thomassen, her husband, while he was not a licensed attorney and while he was not a member of the bar.

9. Under the Ninth Amendment of the Constitution, a federal court lacks the power and jurisdiction to hear and determine claims between a state and a citizen of this state or another state and claims between a state and the federal government relating to liability and property rights of a citizen of that state or another state.

Further, pro per litigants now have an attorney who will represent them in the U.S. Court of Appeals for the Ninth Circuit if their appeals are reinstated.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted in order to prevent the grave injustice done to petitioners, to protect the integrity of the judicial system and to afford the petitioners their day in court, which will all be possible if the Supreme Court exercises its supervisory power to order the U.S. Court of Appeals to recall its mandates and reinstate the petitioners' appeals.

November 17, 1982.

Respectfully submitted.

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